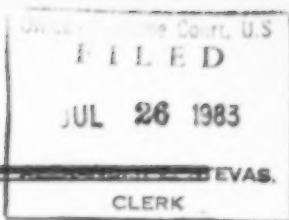


No. 82-1758



IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

KEITH MILTON RHINEHART, *et al.*,
Petitioners,

v.

THE SEATTLE TIMES, a Delaware corporation,
d/b/a The Seattle Times, *et al.*,
Respondents.

On Cross-Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Washington

**PETITIONERS' REPLY TO BRIEF
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

	Page
JURISDICTION	1
REPLY TO RESPONDENTS' STATEMENT OF THE CASE	4
REPLY TO REASONS FOR DENYING THE WRIT	5
1. The State Cannot Condition Access To Its Judicial System Upon A Waiver Of First Amendment Rights.	5
2. The Respondents Tacitly Concede That The Issue Here Has Never Been Settled By This Court. ...	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:	Page
<i>Black Panther Party v. Smith</i> , 661 F.2d 1243 (D.C. Cir. 1981), vacated, 102 S. Ct. 3505, 73 L. Ed. 2d 1381 (1982)	8
<i>Britt v. Superior Court</i> , 20 Cal. 3d 844, 143 Cal. Rptr. 695, 574 P.2d 766 (1978)	6
<i>Caeser v. Mountanos</i> , 542 F.2d 1064 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977)	7
<i>Church of Hakeem v. Superior Court</i> , 110 Cal. App. 3d 384, 168 Cal. Rptr. 13 (1980)	6
<i>Connick v. Myers</i> , ____ U.S. ____, 75 L. Ed. 2d 708 (1983)	5
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975) ..	3
<i>Familias Unidas v. Briscoe</i> , 544 F.2d 182 (5th Cir. 1976)	7
<i>N.A.A.C.P. v. Alabama</i> , 357 U.S. 449 (1958)	9
<i>In re Rabbinical Seminary</i> , 450 F. Supp. 1078 (E.D.N.Y. 1978)	6
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	5
<i>Thomas v. Review Board</i> , 450 U.S. 707 (1981)	5
<i>United States v. Munsingwear, Inc.</i> , 340 U.S. 36 (1950)	8
COURT RULES	
Supreme Court Rule 20.5.	2
OTHER AUTHORITIES	
Comment, <i>Disposition of Moot Cases by the United States Supreme Court</i> , 23 Ill. Chi. L. Rev. 77 (1955)	8
Note, <i>Cases Moot on Appeal: A Limit on the Judicial Power</i> , 103 U. Pa. L. Rev. 772 (1955)	8
Note, <i>The Finality Rule for Supreme Court Review of State Court Orders</i> , 91 Harv. L. Rev. 1004 (1978)	3

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JURISDICTION

The respondents refer to this petition for certiorari filed by Keith Milton Rhinehart, the Aquarian Foundation, and Kathi Bailey ("the Aquarian Foundation petition") as a cross-petition to their own petition for certiorari in No. 82-1721 ("the Seattle Times petition"). Both the Aquarian Foundation petition and the Seattle Times petition are "cross-petitions" in the sense that both seek review of the same decision of the Washington Supreme Court.

This petition for certiorari was timely filed within 90 days after the Washington Supreme Court denied peti-

tioners' timely motion for reconsideration, and would have been filed whether or not the respondents filed their own petition for certiorari. The petitioners ask this Court to grant this writ of certiorari whether or not the Court grants the Seattle Times petition. Supreme Court Rule 20.5.

The respondents argue that this Court has no jurisdiction to grant the Aquarian Foundation petition because the trial court has the power to revise the discovery order and because this case will involve further proceedings in the trial court. (Br. in Opp. at 20-21) Neither reason is valid. The discovery order is a final adjudication by the Washington Supreme Court that the names and identities of members and donors are not protected from disclosure by the first amendment to the United States Constitution. This Court has jurisdiction to issue a writ of certiorari to the Washington Supreme Court.

The respondents argue that the discovery order is not final because the trial court reserved "the right to redetermine what discovery shall be ordered in the event the protective order is modified on review." (Br. in Opp. 20-21) The protective order has not been modified on review (which is why the respondents have filed the Seattle Times petition), and the discovery order remains final.

The respondents seem to be arguing that the discovery order is not final because this Court *might* grant the Seattle Times petition and *might* modify the protective order. This argument proves too much. The fact that a judgment might conceivably be modified on appeal does not render the judgment nonfinal and, therefore, nonappealable. Under the respondents' interpretation, any judgment would be nonfinal so long as it might be modified on appeal.

The respondents also make the meritless argument that the discovery order is not ripe for review by this Court because it "requires no answers to interrogatories, imposes no sanctions, and leaves the scope of discovery open pending review of the protective order." (Br. in Opp. at 21) The decision of the Washington Supreme Court is final for purposes of review by this Court because the federal issue has been finally decided and will survive and require decision regardless of the outcome of future state court proceedings. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975); Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 Harv. L. Rev. 1004, 1029 (1978). The discovery order unequivocally requires Reverend Rhinehart and the Aquarian Foundation to divulge the names of all their donors. (Order Compelling Discovery ¶¶ 1, 9, Aquarian Foundation Petition App. D at 56A-57A) The King County Superior Court and the Washington Supreme Court have categorically rejected the petitioners' first amendment challenge to the discovery order.

The discovery order must be reviewed now to protect petitioners' first amendment rights in any meaningful sense. If review is delayed until a final judgment, petitioners will be forced to choose between relinquishing their first amendment rights and divulging the information, or disobeying the discovery order and incurring sanctions and possible contempt proceedings in the state court. The Court should not impose this Hobson's choice upon the petitioners. The Court should review the final determination of the Washington Supreme Court that the first amendment does not protect from disclosure the names and identities of members and donors of the Aquarian Foundation.

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

The sole question presented for review by petitioners is the propriety of the order to divulge names of members and donors. (Aquarian Foundation Petition at i) The respondents attempt to divert the Court from this issue by leading the Court into a quagmire of minutia by describing in detail eight different interrogatories, petitioners' objections in the trial court to each interrogatory, respondents' reply in the trial court to each objection, and the trial court's ruling on each objection. (Br. in Opp. 3-11)

The trial court ordered each petitioner to disclose with respect to any gifts or donations the name and address of each donor, the date of the gift, the amount of the gift, and the circumstances of each gift. (Discovery Order ¶¶ 1, 9, and 17, Aquarian Foundation Petition App. D at 56A-58A) The petitioners have consistently asserted that "by revealing names and addresses of donors the defendants would have access to names of all members." (Br. in Opp. at 4b) Thus, although the trial court has not yet ordered the petitioners to produce a list of their members (Discovery Order ¶ 2, Aquarian Foundation Petition App. D at 56A), the effect of the Discovery Order is to reveal the names of all Aquarian Foundation members.¹

¹ The petitioners quoted in the Aquarian Foundation petition from their objections to two interrogatories asking for names of members. The respondents complain that the petitioners never "appealed" these interrogatories to the Washington Supreme Court. (Br. in Opp. at 3 n. 3) The respondents fail to mention that both the Aquarian Foundation and Reverend Rhinehart objected to divulging names of donors because this would reveal the names of members. (Br. in Opp. at 2a, 4b) The petitioners quoted the Foundation's Answer to Interrogatory No. 27 and Rhinehart's Answer to Interrogatory No. 31 in

REPLY TO REASONS FOR DENYING THE WRIT

1. The State Cannot Condition Access To Its Judicial System Upon A Waiver Of First Amendment Rights.

The respondents argue that the petitioners must waive their first amendment rights in order to seek redress within the judicial system for respondents' defamations and invasions of their privacy. (Br. in Opp. at 13) The respondents' absolute-waiver argument is foreclosed by prior decisions of this Court rejecting any effort by the state to condition benefits and opportunities upon a waiver of first amendment rights.

The state cannot condition public employment upon any basis that infringes the employee's first amendment rights. *Connick v. Myers*, ____ U.S. ____, 75 L. Ed. 2d 708, 717 (1983). Nor can the state condition the receipt of unemployment benefits upon a waiver of first amendment rights. *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963). These cases leave no room for the respondents' argument that the state may condition access to its judicial system upon a litigant's waiver of his or her first amendment rights.

their petition because those answers raise the federal claim that the first amendment protects the names of members from disclosure.

The respondents incorrectly state that petitioner Kathi Bailey "does not even allege any timely assertion of the federal question." (Br. in Opp. at 3 n. 3) The petition quotes the Brief of Respondents, filed on behalf of all petitioners in the Washington Supreme Court, which asserts that the first amendment protects against the compelled disclosure of names of members and donors of a religious organization. (Aquarian Foundation Petition at 7) The same argument was made on behalf of all petitioners, including Kathi Bailey, before the trial court. (Second Supp. CP 130-32)

The respondents unsuccessfully attempt to support their argument with cases which hold that a litigant waives a common-law or statutory privilege by interjecting the privileged matter into the lawsuit. (Br. in Opp. at 14-15) None of these cases supports the respondents' argument. Common-law and statutory evidentiary privileges are creatures of the state and may be modified by the state. By contrast, first amendment rights are not so malleable, and may only be infringed to substantially advance a compelling state interest where the infringement is the least restrictive means of achieving the state's goal. (Aquarian Foundation Petition at 10)

The respondents' waiver argument fails for the additional reason that the Aquarian Foundation properly asserts the first amendment rights of its members and donors *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459 (1958). The unnamed members and donors of the Aquarian Foundation are not parties to this lawsuit and never waived their first amendment rights. Even if the Aquarian Foundation itself waived any first amendment rights by filing this lawsuit, the members of the Foundation did not thereby waive their first amendment rights. *Church of Hakeem v. Superior Court*, 110 Cal. App. 3d 384, 168 Cal. Rptr. 13, 15 (1980).

The fact that the members of the Foundation are not parties to this lawsuit undermines the respondents' reliance on the dictum by the California Supreme Court that "the filing of a lawsuit may implicitly bring about a partial waiver of one's constitutional right of associational privacy" *Britt v. Superior Court*, 20 Cal. 3d 844, 858, 143 Cal. Rptr. 695, 574 P.2d 766 (1978), cited at Br. in Opp. 15. The California Supreme Court stated only that the plaintiffs to the lawsuit might waive their associational rights, but never held that an organization may waive its

members' first amendment rights by filing a lawsuit. The same factual distinction negates the respondents' claim that the decision of the Washington Supreme Court is consistent with *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976), which was a class action brought by an organization on behalf of all its members. 544 F.2d at 184.²

The respondents cite only one case in which a party claimed that a constitutional privilege precluded discovery. *Caeser v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977). (Br. in Opp. at 14) *Caeser v. Mountanos*, is not only contrary to respondents' argument; it employs the same analysis for which petitioners argued in the Aquarian Foundation Petition. The Ninth Circuit held in that case that constitutionally privileged information is subject to discovery only to further a compelling state interest and only where the discovery is narrowly drawn. 542 F.2d at 1069. Petitioners agree. (See Aquarian Foundation Petition at 10.)

The respondents' waiver argument is inconsistent with prior decisions of this Court, and is contrary even to the cases cited by respondents.

2. The Respondents Tacitly Concede That The Issue Here Has Never Been Settled By This Court.

This Court has never before considered the important federal question presented here, i.e., the circumstances under which an arm of the government may constitutionally require a church to open its membership rolls and financial records to the hostile scrutiny of a third

² In any event, *Familias Unidas* is not "completely consistent with the decision below" (Br. in Opp. at 16), because the Fifth Circuit strongly questioned the propriety of the discovery order, even though the organization as representative of its members asked for damages to the class. 544 F.2d at 192.

party. (Aquarian Foundation Petition at 8) The respondents fail to identify any decision by this Court which has resolved this issue. Respondents do not appear to question that this case presents important reasons for review under Supreme Court Rule 17.1(c), but rely instead on their erroneous absolute-waiver argument.

The respondents concede that the *Black Panther* case "arguably" supports the petitioners' position, but characterize the *Black Panther* case as "discredited" by virtue of this Court's "summary reversal." *Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981), *vacated* 102 S. Ct. 3505, 73 L. Ed. 2d 1381 (1982). (Br. in Opp. 18-29) The *Black Panther* case is not "discredited" because it was not, as respondents state, "summarily reversed." The parties to the *Black Panther* case agreed even before this Court granted certiorari that the case was moot because the Black Panther Party had exhausted all available resources to finance the litigation. (Br. for the Resp. in Opp. at 2-3, *Moore v. Black Panther Party*, 102 S.Ct. 3505, 73 L.Ed.2d 1381 (1982)) The Black Panther Party did not oppose vacating the judgment, since "the established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way [to the Court] or pending [the Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.*, quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Cf. Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. Chi. L. Rev. 77 (1955); Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772, 794 (1955). The *Black Panther* case was not reversed for any fault in its logic, but was vacated for mootness.

The respondents argue that most of the cases cited in the Aquarian Foundation Petition are "wholly irrelevant." (Br. in Opp. 17-18) The cases cited by petitioners illustrate two points. First, the compelled disclosure of members and donors of religious and political organizations is a recurrent problem which should be resolved by this Court. (Aquarian Foundation Petition at 9) Second, only one district court has held that the state established a sufficiently compelling reason to compel disclosure of members and donors. *In re Rabbinical Seminary*, 450 F. Supp. 1078 (E.D.N.Y. 1978). No other court has ordered disclosure of members and donors of a church. (Aquarian Foundation Petition at 9-10)

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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